1980

Robert Myers and Jackie Myers v. Reggie McDonald : Brief of Defendant-Respondent

Utah Supreme Court

Anthony M. Thurber; Attorney for Plaintiffs-Appellants;
Nelson L. Hayes; Richards, Brant, Miller & Nelson; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT MYERS and JACKIE MYERS, his wife,

Plaintiffs-Appellants,

vs.

REGGIE McDONALD,

Defendant-Respondent.

Case No. 17046

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM THE ORDER OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, PRESIDING

NELSON L. HAYES
RICHARDS, BRANDT, MILLER
& NELSON
Attorneys for Defendant-
Respondent
48 Post Office Place
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

ANTHONY M. THURBER
Attorney for Plaintiffs-
Appellants
211 East Broadway
Suite 213
Salt Lake City, Utah 84111
Telephone: (801) 533-0181

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT MYERS and JACKIE MYERS, his wife,

Plaintiffs-Appellants,

vs.

REGGIE McDONALD,

Defendant-Respondent.

Case No. 17046

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM THE ORDER OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT, PRESIDING

NELSON L. HAYES
RICHARDS, BRANDT, MILLER
& NELSON
Attorneys for Defendant-
Respondent
48 Post Office Place
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

ANTHONY M. THURBER
Attorney for Plaintiffs-
Appellants
211 East Broadway
Suite 213
Salt Lake City, Utah 84111
Telephone: (801) 533-0181

TABLE OF CONTENTS

AUTHORITIES CITED

STATUTES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT MYERS and JACKIE MYERS, his wife,

Plaintiffs-Appellants,

vs.

REGGIE McDONALD,

Defendant-Respondent.

Case No. 17046

RESPONDENT REGGIE McDONALD'S BRIEF

NATURE OF CASE

Appellants, Robert Myers and Jackie Myers, filed suit in the Third District Court in and for Salt Lake County against defendant Reggie McDonald for the alleged wrongful death of one Bobbie Charles Menzies which resulted from an automobile accident on November 22, 1976.

DISPOSITION IN THE LOWER COURT

Defendant's Motion to Dismiss based upon the limitation period found in Utah Code Annotated §78-12-28 was heard on March 13, 1980, and an Order granting said Motion was entered on March 31, 1980. Plaintiffs appealed from that Order.

RELIEF SOUGHT ON APPEAL

Plaintiffs-appellants seek a reversal of the judgment of the lower court.

STATEMENT OF FACTS

Defendant-respondent lacks any information and belief to confirm those facts cited by plaintiffs-appellants relative to earlier proceedings on the custody and guardianship of their ward, Bobbie Charles Menzies. The fact that the instant action was filed on October 29, 1979, more than two years after the alleged death of Menzies, is undisputed and confirmed by the record on appeal.

ARGUMENT

POINT I.

PLAINTIFFS' CAUSE OF ACTION ACCRUED AT THE TIME OF THE DEATH OF THEIR WARD.

Plaintiffs have appropriately cited this court's earlier decision in Platz v. International Smelting Co., 61 Ut. 342, 213 P. 187 (1922), as determinative of when a cause for wrongful death accrues. Plaintiffs have erroneously attempted to apply dictum in that case to support their proposition that a cause of action for wrongful death does not accrue until the potential plaintiff has knowledge of the death. They cite as authority for that proposition the following language quoted from an earlier federal court decision:

> To start the running of a statute of limitations, there must be someone capable of suing, someone subject to be sued, and a tribunal open for such suits. 213 P. at 188.

The language quoted above concededly is in line with the contemplation of the Statute of Limitations but plaintiffs' argument is self-defeating. From the time of death of plaintiffs' ward, if in fact the person called "Joey" was Bobbie Charles Menzies, the plaintiffs were authorized by statute to bring their action for wrongful death. In addition, the defendant-respondent was subject to suit in the jurisdiction of any court within the state of Utah. Thus, the requirements expressed above were met at the death of Menzies.

As a matter of fact, contrary to plaintiffs' characterization, the Platz decision closely parallels the instant matter. In Platz, this court was asked to construe the predecessor of our present wrongful death statute, the earlier version being nearly identical to the present. The specific question addressed was whether the cause of action failed to accrue until the administrator of the deceased was appointed almost two years after the death of the deceased. This court answered that question thusly:

> The great weight of authority, if not the unanimous authority, supports the argument of respondent to the effect that the statute of limitations began to run against the right of action immediately after the death of the intestate. The Supreme Court of Kentucky, in Louisville and N.R. Company v. Sanders, 86 Ken. 259, 5 S.W. 563, in our judgment, lays down the rule that is supported both by reason and authority as follows:

'Upon the other hand, however, the law evidently looks to a speedy settlement of such claims. This is its policy. It has, therefore, prescribed the shortest period of limitation . . . . Public policy and the general quiet must be regarded rather than the individual hardship.'

The statute of Missouri provides that an action for wrongful death may be brought by the husband or wife of the deceased, or, if their is no husband or wife, or he or she fails to sue within six months, then by the minor child of children of the deceased. The statute of that state also provides that every such action must be commenced within one year after the cause of action shall have accrued. The Supreme Court of Missouri, in Kennedy v. Burrier, 36 Mo. 128, said:

'When, then did the cause of action accrue? We think the cause of action accrued whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was person in esse to whom the damages ought to be paid and who might sue for and recover the same, then clearly the cause of action had accrued as against him. When, then, did this liability take place? Evidently at the death of Kennedy. The defendant at that time had done the whole wrong complained of, and there was a person in esse - Kennedy's widow - entitled to receive and empowered to sue for the damages. Then the cause of action clearly accrued at the death of Kennedy, and the statute commenced running from that time. The fact that the right to damages, and consequent right to sue for them, at different times, is vested in different individuals, can make no difference as to the time the cause of action accrued.' 61 Ut. at 348.

It is clear that this court, speaking to the same question as in the instant case, held that the right of action for wrongful death accrued at the time of death

and that the Statute of Limitations begins to run from that time. The court apparently resisted arguments contrary to this posture on the grounds that the demands of public policy for a general quiet are greater than claims of individual hardship.

Because the plaintiffs were legally capable of bringing suit against the defendant-respondent at the time of the death of their ward, the limitation period began to run at that time. Thus, plaintiffs' cause of was limited by §78-12-1 which states:

> Civil actions can be commenced only within the periods prescribed in this chapter after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

Section 78-12-28 establishes a two year limitation period for wrongful death actions. Nowhere does it appear in the statutes or case law of this jurisdiction authority for the proposition that a different limitation period is applicable.

Plaintiffs concede that the two year period has long since expired and accordingly, the claim is now barred as found by the court below.

POINT II.

WHETHER THE LIMITATION PERIOD ON WRONGFUL DEATH ACTIONS IS "GENERAL" OR "SPECIAL" IS IMMATERIAL TO THE INSTANT CASE.

Assuming, without deciding, that the limitation statute for wrongful death actions is a "general" statute as opposed to a "special" statute, it still does not change the result of the question presented to this court. Whether the statute is "general" or "special" is immaterial because there is no authority, statutory or otherwise, which dictates that the lack of knowledge of one's claim in a wrongful death contest, constitutes an effective tolling of the Statute of Limitations.

The cases cited by plaintiffs for the proposition that the Statute of Limitations was tolled by plaintiffs' lack of knowledge of the death of their ward are clearly distinguishable and not controlling.

In the recent case cited by appellant of Foil v. Ballinger, 601 P.2d 144 (Ut. 1979), the court was addressing a question entirely centered in the Medical Malpractice Statute and its associated Statute of Limitation. In that case this court specifically held:

> In determining the proper construction to be placed upon §78-14-4, it is important to keep in focus the proposition that the section deals only with malpractice actions against health care providers; it is not a general statute of limitations . . . .
>
> Because of the nature of the malpractice actions and based upon prior Utah law, we hold that the statute begins to run when an injured person knows or should know that he has suffered a legal injury.

This court clearly has stated that §78-14-4, and its attendant "knowledge" requirement deals "only with malpractice actions and is not a general Statute of Limitations, and the reason for its special tolling provision is the unique nature of malpractice actions.

This court in Foil went to great lengths to explain that provisions of the Malpractice Act, including tolling provisions, do not apply to other types of actions, i.e., wrongful death, etc. Foil accordingly is not to be read with other decisions of this court as controlling of any issue outside the realm of malpractice actions.

Switzer v. Reynolds, 606 P.2d 244 (Ut. 1980), is also not controlling and is distinguishable from the instant case. In Switzer, the court ruled that the Statute of Limitation for wrongful death actions is tolled by a Disability Statute. In the present controversy the plaintiffs do no claim any tolling by the Disability Statute or any other statute specifically designed for the same effect.

Respondent argues that the Switzer decision was a narrow decision construing specifically the effect of §78-12-36(1) on §78-12-28(2), Utah Code Annotated (1953 as amended). This court in its closing paragraph accordingly stated:

> From the foregoing cited cases in which statutory provisions similar to those involved herein were construed, the conclusion is compelling that the limitations period of §78-12-28(2) is tolled by §78-12-36(1), in an action for wrongful death pursuant to §78-11-7.

Clearly, Switzer speaks to specfic statutes and cannot be read as broad as the appellants suggest.

POINT III.

THE STATUTE OF LIMITATIONS IS A LEGAL RATHER THAN AN EQUITABLE DEFENSE AND HENCE MAY BE INTERPOSED REGARDLESS OF EQUITIES.

Appellants represent to the court alleged facts not properly supported or before the court in this proceeding. Again assuming, without deciding said facts are accurate and admissible, their existence does not destroy respondent's defense based on the Statute of Limitations.

In the case of Patsy v. Budge, 38 P.2d 712 (1934), this court stated:

> It is argued by plaintiff that the defendant 'is equitably estopped from pleading the Statute of Limitations as a bar to plaintiff's action,' and points to plaintiff's allegations: that the defendant with intent to deceive the plaintiff and to induce her from bringing an action against him for his said negligence and malpractice of which he well knew he was guilty, fraudulently concealed from plaintiff the facts as to his negligence, or the fact that the said broken steel blade was in her body and was the cause of her distress and suffering, etc.

> It must be remembered that the Statute of Limitations is a legal, and not an equitable, defense. It is available, regardless of the equities, if the facts are such as to warrant the interposition of the plea. 38 P.2d at 716.

The case of Burningham v. Ott, 525 P.2d 620 (1974), cited by plaintiffs is not helpful to their position and accordingly, appellant's claim of equitable estoppel must fail in this instance.

CONCLUSION

It is clear that plaintiffs have no authority for their proposition that the cause of action accrued at the time they learned of the death of their ward. Cases cited by plaintiffs are distinguishable and do not control the outcome of this controversy. The court below was correct in its interpretation of the existing law in Utah and this court should affirm the decision rendered.

Respectfully submitted this 22 day of August, 1980.

RICHARDS, BRANDT, MILLER
& NELSON

Nelson L. Hayes

NELSON L. HAYES
Attorney for Defendant-
Respondent

CERTIFICATE OF SERVICE

HAND-DELIVERED, a true and correct copy of the foregoing Respondent's Brief this 25 day of August, 1980 to Mr. Anthony M. Thurber, Attorney for Plaintiffs-Appellants, 211 East Broadway, Suite 213, Salt Lake City, Utah 84111.